No. 510

In the Supreme Court

of the United States

OCTOBER TERM, 1941

C. H. COCHRAN, *Appellant*,

vs.

THE STATE OF KANSAS and MILTON F. AMRINE, Warden of the Kansas State Penitentiary, *Appellees*.

Appeal from the Supreme Court of the State of Kansas.

BRIEF OF APPELLEES

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BRIEF OF APPELLEES

STATEMENT

C. H. Cochran, appellant herein, was charged in a complaint in writing filed before a justice of the peace in Sumner county, Kansas, in December, 1932, on one count of forgery on a described check, and a separate count with uttering the same check in Sumner county, Kansas. A warrant, which was issued on this complaint, was delivered to the sheriff of Sumner county, Kansas, on April 12, 1933, who arrested the appellant in an adjoining county and returned him to Sumner county. On

April 20, 1933, a preliminary examination was held before the justice of the peace, at which time appellant appeared in person and by his attorney, and being bound over for trial to the district court, an information was duly filed charging the same offenses charged in the warrant. The trial came regularly on for hearing in the district court of Sumner county, Kansas, on May 15, 1933; a verdict of guilty by the jury was returned upon the second count, and on May 20, 1933, the appellant's motion for a new trial and his motion for arrest of judgment were considered and overruled.

On May 29, 1933, following presentation of evidence by the county attorney, the district court of Sumner county found that the appellant had previously been convicted of two other separate and distinct felonies, and under the habitual criminal act of Kansas, was sentenced to life imprisonment in the Kansas State Penitentiary.

At all stages of the proceedings above narrated, from the date of the preliminary hearing to the sentence, inclusive, the appellant was present in person and with his counsel. No appeal was taken from the conviction and sentence and no appeals were taken from the denial of motion for a new trial and motion for arrest of judgment.

The appellant was incarcerated in the state penitentiary at Lansing on May 31, 1933. In October, 1935, the appellant filed a petition for a writ of habeas corpus in the supreme court of Kansas. The petition was considered and denied by the supreme court of Kansas in the case of *Cochran v. Simpson,* 143 Kan. 273, 53 P. 2d 502. Subsequently a second petition for writ of habeas corpus was filed in the Kansas supreme court, No. 33075, which was denied April 20, 1936, without a written opinion. Since then the appellant has filed several other applications for writs of habeas corpus, including two in the United States district court for the district of Kansas, one or more in the district court of Leavenworth county, Kansas, and has made applications of some nature to the district court of Sumner county, Kansas. The appellant filed a third application for a writ of habeas corpus in an original action in the supreme court of Kansas on January 8, 1941, and also filed a notice of appeal from a denial of an application for a writ from the district court of Leavenworth county, Kansas, on January 2, 1941. This original application was considered and denied in the case of *Cochran v. Amrine,* 153 Kan. 777, 113 P. 2d 1048, and the appeal from the district court of Leavenworth county was dismissed in

the same opinion for the reason that the appeal was not perfected.

On the application for the writ of habeas corpus filed January 8, 1941, which is the basis of this appeal, the appellant set out in generalities the grounds for the issuance of the writ, numbering seven. At the beginning of each one of the seven grounds the appellant uses the phraseology, "The record shows that," (R. 2, 3, 4) and throughout the application, which was followed by the petitioner's so-called statement of facts and abstract (R. 7) were certain statements which were not corroborated, relating to the sequence of events. Following the original application and subsequent order of consolidation of an appeal from a denial of a writ of habeas corpus from the district court of Leavenworth county, Kansas, the respondent filed return (R. 37) pursuant to the direction of the supreme court of Kansas. In this return was set up the authority for the detention of the appellant by the appellee, Milton F. Amrine, as warden of the Kansas State Penitentiary, which included certified copies of the commitment to the state penitentiary, criminal action sentence, information, journal entry of judgment, a letter from the County Attorney of Sumner county, Kansas, directed to Mr. Kirk Prather, the warden

of the Kansas State Penitentiary, and copy of the appellant's record of the Federal Bureau of Investigation.

QUESTIONS PRESENTED

In appellant's brief there are six questions proposed for consideration by this court. We cannot agree that all of the six questions should be considered, and we wish in the following argument to outline our reasons for this viewpoint. We think that the three questions involved in this controversy, is (1) whether the appellant *was* denied the right to appeal from his conviction and sentence to the Kansas State Penitentiary by wardens thereof, their employees, or others connected with the state of Kansas, and (2) whether in the trial court of Sumner county, Kansas, this appellant was denied the right to subpoena witnesses, and (3) to testify in his own behalf. Summed up, these are questions of fact which were for determination in the supreme court of Kansas. The burden of proof to sustain the allegations alleged in the application was upon the appellant. We respectfully maintain that the appellant failed to establish proof as to the allegations contained in his application, hence denial by the writ of the supreme court of Kansas.

SUMMARY OF ARGUMENT

The first question propounded on behalf of appellant is:

> "Whether the action of prison wardens and other state officials in forcibly preventing petitioner from pursuing criminal appeal afforded by state statute until after time for such appeal had expired was in violation of the equal protection clause of the fourteenth amendment."

That question in itself is unfair and presumptive. The appellees herein admit that if such question was fairly presented and such facts as alleged by the appellant were disclosed as being true before the supreme court of Kansas, there would be no question but that there was a violation of the equal protection clause of the Fourteenth amendment, and further, answering the second question presented, the appellees concede that if there was such discriminatory action, it would be a denial of the constitutional right guaranteed by the fourteenth amendment and that the commitment under which the appellant is held would be void.

The third question is whether the denial to the defendant in a criminal prosecution of the use of compulsory process for witnesses in his defense is a violation of the due process clause of the fourteenth amendment.

Obviously again we realize that in such denial would be a violation of the due process clause of the fourteenth amendment; and likewise, as to the fourth question presented, that if there had been a denial to a defendant in a criminal prosecution of the right upon his so requesting, to testify in his own defense, it too would be a violation of the due process clause of the fourteenth amendment.

The fifth question presented on behalf of the appellant is whether the factual determination of the court below has any support in the record. That will be discussed further in this brief as well as the sixth question which is presented, whether the court below erred in refusing to afford petitioner an opportunity to prove the issues of fact controlling the constitutional validity of his detention. We think ample opportunity was afforded the appellant to make his showing, which he failed to do.

In the original application (R. 2, 3, 4) the appellant alleged in setting out his seven points for sustaining his contention, using the phraseology in the beginning of each one of these seven grounds, "The record shows that," and thereafter set out his grievances. It would indicate that he was attempting to rely upon some record or records as competent evidence to prove that he

had been denied the right to appeal, to subpoena witnesses in his behalf and to testify himself personally at his trial. What these records were, to which he made constant reference is not known—and that can only be presumed—but the contention of the appellees is that it could only be records of courts of competent jurisdiction, records of the State Penitentiary at Lansing, or possibly records of the State Board of Administration, which has jurisdiction of the state penitentiary. He offered nothing in the trial court and there was no record presented to the supreme court of Kansas to confirm to any degree the contention of the appellant in the court below.

ARGUMENT

The appellant complained that *the record shows* that the duly authorized officials and prison officials exercised unlawful authority by "suppressing your petitioner's appeal documents in a manner violative of their lawful duty and contrary to the statutes of the state of Kansas, to thwart, obstruct and deprive your petitioner of his lawful rights of appeal." (R. 3.) And likewise to the same effect the petitioner, in the application said:

> "The records show that your petitioner, after incarceration, was arbitrarily denied by prison rules and the arbitrary acts of the officials of his

> lawful rights of his appeal and was denied the right to secure a transcript from the trial court, arbitrarily denying hearings of his appeal in the supreme court of the state of Kansas, and denied him the right to file his record case in the supreme court of the state of Kansas by E. M. Stubblefield, deputy warden, Lacy M. Simpson, warden, who, the records show, refused your petitioner to mail abstract and brief to the supreme court, and arbitrarily suspended habeas corpus." (R. 3.)

Such statements are erroneous and are absolutely unsubstantiated by any record, whether it is the records of the supreme court of Kansas, the district court of Sumner county, Kansas, the district court of Leavenworth county, Kansas, or the records of the Kansas State Penitentiary at Lansing.

The supreme court of Kansas, in *Cochran v. Amrine*, supra, filed June 7, 1941, which is the basis of this appeal, set out that the petitioner alleged that the commitment issued out of the district court of Sumner county, Kansas, auhorizing his imprisonment for life and was void for the following reasons:

> "The record shows (1) jurisdiction of the court to issue the commitment was procured through the reckless contrivance in the pretense of a trial which, in and by itself, deprived your petitioner of every right secured to him by the state and federal constitution and precluded . . . "Due

> Process of Law."' (2) That the court went beyond the bounds of judicial discretion in overruling his motion without a hearing. (3) That the duly authorized officers unlawfully suppressed his appeal. (4) That after his imprisonment the then warden and other officers of the prison suppressed and refused to permit him to mail documents pertaining to an appeal and to habeas corpus. That the records will show (1) that he has consistently been deprived of due process of law by the courts and the officers and agents of the state; (2) that his previous petitions have been dismissed by the courts of the state, without recourse to the record, upon the unfounded assumption the record shows his conviction by an orderly trial within the requirements of due process of law, and (3) that the officers and agents of the state are exercising unlawful authority over your petitioner, obtained by methods contrary to due process of law." (R. 60.)

The court took cognizance of the generalities in which the appellant complained of his detention because of the commitment issued out of the district court of Sumner county on May 29, 1933. The supreme court of Kansas was most generous in its opinion when it said:

> "All these allegations are made in the most general terms, void of any specifically alleged, controvertible facts; yet, (fol. 82) in order that petitioner might not be deprived of any of his rights, we waived our rules respecting a deposit for costs and the printing of abstract and brief, allowed the

petition to be filed, and directed respondent to file a return. Respondent has prepared and filed his return which includes pertinent records of the trial, and a copy thereof was served upon the petitioner, who now complains that the records have been brought before the court; also, briefs have been filed by both parties.

Except in one particular, later to be noted, the record shows none of the facts alleged by the petitioner." (R. 61.)

The appellant, throughout his application, had continued to make references to what the *records* would show. The respondent in the court below produced certified copies of the record in the district court of Sumner county, Kansas, the authority for which was the detention of the petitioner by the warden of the state penitentiary. To controvert this showing, the appellant produced very little. It might be fair to say that he produced something, which evidently the supreme court of Kansas did not weigh with much credibility. Made a part of his application were so-called statement of facts (R. 7) which were unsubstantiated, and also attached thereto were three affidavits, one by Mrs. E. L. Hinton (R. 17), one by Frank Boaz (R. 17) and one by C. C. Crebs (R. 18). The latter two are inmates of the Kansas State Penitentiary, serving life terms and both have

repeatedly filed applications for writ of habeas corpus in various courts. The affidavit of Crebs states that "on or about the 15th day of May, 1933, C. H. Cochran asked me to offer correction to errors, if any, in his appeal documents." The record discloses that the appellant was not incarcerated in the Kansas State Penitentiary until May 31, 1933. (R. 53.)

The appellant complains in his brief:

> "Viewed in the light of the federal questions raised by petitioner, the opinion of the court below does not indicate the basis for its decision on the question where forcibly preventing petitioner from exercising right of appeal, was the denial of equal protection. The court apparently refused to accept petitioner's affidavit and offer of proof on the theory that his failure to include this ground in his herein application for habeas corpus destroyed his credibility."

Then the opinion in the case of *Cochran v. Amrine*, supra, was quoted in appellant's brief, which read:

> "There is nothing in the record to indicate that the petitioner attempted to appeal his case to the supreme court." (R. 2.)

Obviously, again appellant had emphasized in his application to that court that the *record* would show that all of his allegations were true and the appellees herein produced the record, which did not uphold the fabulous

allegations made by the appellant in his original application. On the other hand, the supreme court of Kansas said in its opinion, as cited above, that the petitioner upon the return of the respondent now complains "that the records have been brought before the court." The journal entry of judgment from the district court of Sumner county, Kansas, which the supreme court of Kansas had before it as part of the respondent's return, and which has not been controverted by the appellant herein.—Incidentally, the journal entry was approved by the attorney for the appellant in the trial court.—There is no evidence that the appellant filed praecipe for summons of any witnesses; there is nothing in the record to indicate that the appellant was denied the right to testify on his own behalf, but the journal entry does recite:

> "A jury is duly and legally empaneled and sworn to try the case. The opening statement is made, the plaintiff's witnesses are sworn and testify and evidence introduced and the state rests. Defendant's opening statement is made (fol. 60), evidence introduced and the defendant rests. The jury is instructed in writing and argument of counsel made and the jury retires in charge of the sworn bailiff to deliberate." (R. 45.)

That was on May 15, 1933, five days later, a hearing was had upon a motion for a new trial, at which time

counsel and appellant were present. (R. 45.) Likewise, on the same day the motion in arrest of judgment was heard and argued, which motion was overruled by the court. (R. 46.) The record speaks for itself in that the appellant was not denied the right to file a motion for a new trial and motion in arrest of judgment. What restraining influences would have prevented his having filed notice of appeal at this particular time, which is the prevailing practice in most courts.

Nine days later, May 29, 1933, judgment and sentence were passed, at which time the defendant was present as well as was his counsel. Evidence was offered that the defendant had been convicted of two prior felonies and that the defendant was a habitual criminal. The journal entry recites:

> "Whereupon, inquiry is made of the defendant if he has any legal cause to show why judgment and sentence should not be pronounced against him upon the findings of the jury, and there appeared no legal cause." (R. 46.)

Thereupon judgment was passed by the district judge of Sumner county and the journal entry of trial was approved by the attorney for the defendant as well as by the county attorney. There is nothing in this record to indicate an intention or effort to appeal.

The appellant asserts in his brief that certain affidavits were removed from the original application and withheld from the court, and filed a motion to subpoena witnesses twenty days after the court's opinion was handed down which would testify in support of his application. It must be recalled that in the application originally filed, this appellant was stressing to the supreme court of Kansas that the *records* show that he was deprived of his constitutional guaranties; that the trial court abused its discretion by overruling the petitioner's motion in the court or without any hearing at all (R. 3), and further, the record shows that "the prison officials had exercised their authority in denying the appellant the right to appeal" (R. 3), and that the records would show "that he was denied by prison rules, and the arbitrary acts of the officials of his lawful right of his appeal and was denied the right to secure a transcript from the trial court." (R. 3.) Each and every allegation made by the appellant in the original application is unsubstantiated by any semblance of a record. While on the other hand, the appellees supplied the supreme court of Kansas in the return with certified copies of the records from a court of competent jurisdiction relating to the case at bar.

In the summary of argument in the brief of the appellant it is contended that there were specifically three bases for asserting that the detention of the appellant was constitutionally invalid. First, that the acts of the prison wardens and other state officials in forcibly and discriminatorily preventing appellant from appealing his original conviction within the time in which an appeal could be filed, was a denial of the equal protection of the laws.

Upon what to base that as a fact is not clear to the appellees. The appellant started out on the premise that he was going to produce records or show by competent evidence that he was denied the right to appeal. The only evidence produced were the statements of the appellant himself, two other inmates of the state prison and an unknown woman. Evidently the supreme court took cognizance of the record produced by the appellee and gave it the greater weight of credibility than the evidence offered by appellant.

The second contention in the summary of argument proposed by the appellant is "That denying him the right to compulsory process to secure witnesses for his defense at the trial was a deprivation of due process." If the appellant had been deprived of the right of com-

pulsory process to secure witnesses for his defense, the appellee would readily admit that it was a denial of due process, but the appellant has not supported this allegation with any evidence. Again he has alluded to the fact as to what the *record* would show. There is no showing that any praecipe of witnesses was filed or request made to the court.

Likewise to the same effect is the third ground that is argued in the summary of argument, and that is "That preventing him from taking the stand to testify in his own behalf when he requested to do so was also a deprivation of due process." Not one offering of evidence was made on this point for consideration by the supreme court of Kansas other than the bare allegation of the appellant. As stated before, the attorneys for the appellant approved the journal entry of judgment, and as pointed out in the affidavit of the county attorney of Sumner county:

> "Affiant further states that the defendant was present at all times during the trial, except that he was not present with the jury during their deliberations and that he was present within the courtroom and represented by his attorney at the time the motion for a new trial and motion for arrest of judgment were argued and heard, and overruled by the court, all as appears in the jour-

nal entry hereinabove mentioned and referred to and full faith and credit should be given herein to the official acts of the district court of Sumner county, Kansas." (R. 51.)

The appellant in his brief attempts to give strength to the statement that he was ignorant of his constitutional rights. That, of course, is a stock explanation. The appellant has had a long career of crime. As a matter of fact, most of his life he has been in difficulty with society and he is not in the position of a first-time offender. The appellant was convicted of a felony by a jury in a court of competent jurisdiction, and being found to be an habitual criminal, was sentenced to the state penitentiary for life. To infer that he did not know of his right of appeal or possibly had not been apprised of such by his attorney, is a species of a rare imagination.

The appellant has endeavored through various courts and the state parole board to procure his release from the state prison. He was filed numerous applications, as set out, and *only* in this instant case has he presented the thought that he was denied the right to appeal. We are not suggesting the doctrine of *res judicata*, but we are submitting that the burden of proof rests squarely upon the appellant to prove his grounds for release

through habeas corpus. This appellant started out in his original application to show by the *record*, but the record has been produced and there is not one shadow to sustain his argument that he was denied the right of appeal or denied the right to testify in his own behalf in the criminal action, or denied the right to subpoena witnesses for his defense. No discrimination has been shown by the prison officials or court attaches in the denial of the right of appeal.

The statutes of Kansas, G. S. 1935, 62-1704, provide: "The appeal must be taken within two years after the judgment is rendered."

This appellant had two full years in which to perfect his appeal. In all that time he was not heard to complain, nor did he file one document indicating his intention to appeal from his conviction and commitment. Subsequently he filed numerous applications for writ of habeas corpus in the supreme court of Kansas, the United State district court for the district of Kansas, and in some of the district courts of Kansas, but never previously made reference to an appeal.

In this case he alleges he was denied the right to appeal, and sets out that the *records* will show that he was denied the right to appeal by prison rules, arbitrary acts

of public officials and that the prison officials suppressed his appeal documents, which in effect was denying his right to appeal. All this he is going to prove by the *records*. (R. 2, 3, 4.) Instead, he offers his own statements and three affidavits, two of which are those of convicts, for the consideration of the court below, on this very important allegation.

It is not the question of the right of appeal that is herein presented, but the question of whether that right was denied by the state or its employees. The burden of proof is upon the appellant to show this by competent evidence. The supreme court of Kansas examined the pleadings and the evidence and evidently came to the conclusion that the allegations of the appellant were far fetched and were unsupported.

The Supreme Court said:

> "No evidence has been offered to support these allegations other than the bare statement of the petitioner. The records of courts are not set aside upon the unsupported statements of a defeated litigant." (R. 63.)

The argument of the appellant in saying that the statement of the supreme court of Kansas in its opinion, which said: "There is nothing in the record to indicate the petitioner attempted to appeal his case." (R. 62.)—

"was a conclusion, not only without substantial basis upon the record; it is also palpably erroneous." We suggest that the appellant cite *any portion of the record* that substantiates his contention that there is anything in the record to indicate an appeal was attempted. The substance of it is purely the appellant's complaint. The district court of Sumner county is a court of competent jurisdiction and a court of record. Most certainly its record should not be discarded or eliminated merely by the statement of an individual serving a life sentence in the state penitentiary.

The appellant in his brief alludes to the fact that evidently the supreme court of Kansas based its final determination that on an earlier application, *Cochran v. Simpson*, supra, petitioner had not raised the important angle that he was denied the right of appeal. Again it must be directed to the attention of this court that the supreme court of Kansas did consider and evidently weigh the record supplied in the return by the respondent as against the affidavits of the appellant and his associates in the state penitentiary. As said before, that was a matter for the determination by the supreme court of Kansas and in the application for the writ the appellant continually alluded to the fact that the *records*

would show effectively that the petitioner was denied the right to appeal, the right to subpoena witnesses and the right to testify in his own behalf at his trial. Obviously the records do not disclose any truth to these allegations.

The appellant attempts to give strength to his own affidavit and to those he filed, signed by two inmates of the state penitentiary, and one Mrs. E. L. Hinton. In the latter this woman alleges she was given written consent of the "power of attorney," but it must be noted that her visit to the state penitentiary was in June, 1934, whereas the affidavits of the two inmates of the penitentiary were a year previous. The "power of attorney" to act could not be denied by the warden or any employees of the state penitentiary. The right to act as an attorney in the courts of Kansas is passed upon by the courts themselves and not by state employees. No effort was made following this so-called conveyance of "power of attorney" to file any pleadings or motions in any district court or the supreme court of Kansas. No reference is made in the Hinton affidavit as to a contemplated appeal. She only refers to "papers," which can be construed as meaningless and which certainly cannot by any interpretation be determined as a notice of appeal.

The appellant makes light, that following the filing of these affidavits to which the respondent made a subsequent return setting up the authority for the detention of the appellant, that no affidavits or statements were offered in evidence from the prison authorities. It must be pointed out that the administration of the state penitentiary of Kansas changes frequently, and since Warden Simpson and Deputy Warden Stubblefield were officers in charge of that institution there have been two other administrations. The affairs of the state penitentiary are handled through rules, regulations and records. To substantiate his allegations, the appellant has offered no rules or regulations which prohibit him from filing his appeal, or any other records which would uphold his contention. The officials of the state penitentiary of Kansas deal with many prisoners; many, the warden and deputy do not come in contact with. Obviously these officials do not and cannot by independent recollection, even if they were available, recount their many transactions with the various prisoners in the institution. The appellees must rely upon the records of the courts of competent jurisdiction and other evidence in the defense of such litigation involving reckless charges. The appellant has offered no evidence from any state official or em-

ployee supporting his allegations in the least, but has banked his chances on affidavits by other inmates who too are desiring release from the state penitentiary and an unknown woman.

The appellant in his brief relates:

> "The court grants that during the entire period in which the time for appeal was running, the prison officials refused to permit inmates of the jail to file petitions for habeas corpus."

That statement is error. The court did say in its opinion:

> "Soon after the petitioner was confined in the penitentiary he made some effort to file a habeas corpus petition. Under rules then prevailing at the penitentiary, these were not permitted to be sent out, and this much of the allegations of the petition in this case has some basis. These rules did not prevail long, however, and in October, 1935, he filed a petition for habeas corpus in this court. That was duly considered and a carefully prepared opinion was filed, denying the petition." (*Cochran v. Simpson*, 143 Kan. 273, 53 P. 2d 502.) (R. 62.)

There is no evidence or no admission that the right of appeal was denied and it is admitted that for a short time the prison authorities did not permit inmates of the state penitentiary to file the applications for writs of habeas corpus, *which they themselves prepared.* How-

ever, this appellant did not complain about this situation, nor did he allude to this grievance in his petition filed in the supreme court of Kansas in October, 1935, that he had been denied the right of appeal and that he had been denied the right to subpoena witnesses in his own behalf, nor had he been denied the right to testify at his own trial. Caustically, perhaps, but the appellant did not "discover" the invasion of these important constitutional rights until years later. The appellant in his brief goes further and says:

> "It is difficult to believe they would not have practiced the same ruthless disregard of an inmate's statutory rights and thwarted his attempt to send out appeal documents."

This is pure unwarranted speculation, because there is no evidence other than the appellant's weak showing that the prison authorities were denying inmates the right to appeal. Moreover, the Kansas cases are full of criminal appeals in that era of time. To permit an inmate of a state penal institution—a hardened criminal, so to speak—to offer allegations which are lacking substantiation by any record, to attempt to disprove or condemn public officials in bringing up scandalous allegations, is not only dangerous, but most certainly affects the morale of law enforcement. The courts of Kansas

have been generous and patient in entertaining various pleadings and requests of inmates of the penal institution and have permitted inmates of the state penitentiary to file various documents with their defects, omissions and irregularities, contrary to the general practice by members of the bar.

The contention of the appellant in his brief, because of the application which the appellant made to the supreme court of Kansas that "both respondent and the court below concluded that petitioner's evidence should be rejected," is a careless assumption without merit. The appellee met the issues squarely and when issues were joined they were submitted to the supreme court of Kansas for its adjudication. (R. 57.) What credence the supreme court of Kansas may have given to the allegations, affidavits of appellant and his so-called "offer of proof" and, on the other hand, accorded the return of the respondent for the detention of the appellant is best reflected in the opinion of that court in the case of *Cochran v. Amrine*, supra.

The appellant directs the attention of the court to the case of *Johnson v. Zerbst*, 304 U. S. 458, and suggests that the case at bar is no different from that adverted to. We have no complaint with the rule of law laid down in

that case, but we submit it is far fetched to endeavor to apply it to the present one. In that case the question arose as to the denial of assistance of counsel for the defense of the individual, and whether there had been an intelligent waiver of that constitutional right. In this case there is no allegation that there was denial of counsel by the trial court of the appellant in his defense, but, moreover, the appellant as the defendant in the trial court was represented throughout all stages of the proceedings by competent counsel.

There is no analogy, likewise, between the case of *Smith v. O'Grady*, 312 U. S. 329, to which the appellant has referred, wherein the prisoner who was without counsel, was under the misapprehension that he was entering a plea to a lesser crime upon the representation of the prosecuting attorney that he would serve a sentence less than the one to which he was sentenced. In the case at bar the appellant had had a preliminary hearing; had the information read to him; was represented by counsel and was not under any misapprehension as to the seriousness of the charges against him, nor was there any allegation that the county attorney had made any misrepresentations as to the punishment. Moreover, the record presented is clear as to what tran-

spired and it is inconceivable as to how the appellant would try to make the case of *Smith v. O'Grady*, supra, analogous to this case.

Another case which is directed to the attention of this court by the appellant is *Chambers v. Florida*, 309 U. S. 227. The question involved there was an entirely different set of facts than the one presented here. In that case the findings were as they pertained to the trial court, that the prisoners were kept under heavy guard.

> "So far as appears the prisoners at no time during the week were permitted to see or confer with counsel or a single friend or relative." (p. 231.)

This court said in Syllabus 3:

> "The confessions of murder procured by repeated inquisitions of prisoners without friends or counselors present, and under circumstances calculated to inspire terror, held compulsory."

No such allegation is made in this case that this appellant was forced to confess to the crime with which he was charged, or that he was without friends or counselors. On the other hand this appellant in the trial court was found guilty by a jury and was represented by counsel of his own choosing. It must be pointed out also that no allegation has been made by the appellant that he was held incommunicado or that he was not per-

mitted to see friends and counselors. Moreover, the record clearly discloses that he had the advice of counsel and further in the preliminary his bond was set at $1,000, and there is no charge that that amount was excessive.

The case of *Mooney v. Holohan*, 294 U. S. 103, is another case on which the appellant relies, but it must be again emphasized that the case at bar and *Mooney v. Holohan*, supra, are in no sense identical or comparable. In that case this Court found that a criminal conviction was procured by the state prosecuting authorities by the use of perjured testimony known by them to be perjured. The court in that case held that such procedure was without due process of law and in violation of the fourteenth amendment. To that view we subscribe, but we respectfully submit that it has no bearing on or similarity to the grievance of the appellant herein. This court said in that case:

> "Such a contrivance by a state to procure the conviction and imprisonment of a defendant is inconsistent with the rudamentary demands of justice, as is the obtaining of a like result by intimidation, and the action of prosecuting officials on behalf of the state, like that of administrative officers in the execution of its laws, may institute state action within the purview of the fourteenth amendment." (pp. 112, 113.)

The arguments advanced in that case by the state of California do not coincide with the ones herein presented. There is no comparison between that line of cases than with this one. In this case the defendant in a criminal action, after conviction and sentence, failed to appeal from his conviction, to the supreme court of the state within the statutory period of two years. Years later, after he has had numerous applications for various writs in the several courts of the state of Kansas and the United States, and has applied for executive clemency on many other grounds, he concocts the idea that he was denied the right of appeal by certain state officers and that he was denied the right to testify on behalf of himself in the district court of Sumner county, Kansas, and was denied the right to subpoena witnesses on his own behalf, all of which we respectfully insist are groundless.

As to the latter two, he has not submitted one scintilla of evidence to sustain his position except his own statements, but moreover, the records offered by the appellees on the return, show that throughout all stages of the proceedings about which he complains, he was represented by counsel and there is no record offered or produced which tends to suport his contention. As to the former, that he was denied the right of appeal and his

vague expression that he was not aware of his constitutional rights, despite the fact that he has constantly, for years, been in difficulties with the law, and despite the fact he had a competent counsel in the trial court, he overlooked and failed in previous applications to set out these three significant grounds, all of which were important and substantial grounds for a release through habeas corpus. It must be pointed out also that in the first application for writ of habeas corpus which was heard in the United States district court of Kansas, before Hon. John Pollock, United States district judge, this appellant had counsel. He makes no contention that he was denied the right of counsel. Many other cases cited, including the case of *Hebert v. Louisana*, 272 U. S. 312, it is respectfully contended have no semblance to the instant case.

The case of *Brown v. Mississippi*, 297 U. S. 278, is not in point because the facts have no similarity. In that case a confession of murder was shown to be extorted by state officers through torture. No confession is here involved and no torture is alleged. The appellant in the trial court pleaded not guilty to the felony charges. He was tried by a jury and found guilty, filed a motion for a new trial and a motion for arrest of judg-

ment. From that time the records reveal he did nothing relative to an appeal.

The appellant has another erroneous viewpoint and it is set out in his brief, and that is that he is continually referring to the fact that he is a poor man and should have the same right to courts as do all other citizens. To that view we adhere, but we want to direct the attention of this court to the fact that in the many applications which he has filed, in every instance he has proceeded *in forma pauperis*. The courts, penitentiary officials, court attachés and others have been generous in accepting the various pleadings of this appellant, in assisting him to get his pleadings before the court, in permitting him to file applications and other documents without the court deposits. He has written volumes of material to the various supreme court justices of Kansas, United States district judges, the district judge who sentenced him, the clerk of the Kansas supreme court, the attorney general, and many others. He fails to recognize that the state penitentiary is a penal institution and by necessity there are orders and rules relating to discipline and other matters pertaining to the conduction of its affairs. Quite naturally a man incarcerated in the state penitentiary cannot present material to a

court or to other persons on the outside without censorship. Quite true, the facilities to one incarcerated in a state penal institution are not nearly so accessible as to others. However, it is respectfully contended that the state of Kansas, its wardens, its courts, its agents and employees have been most generous respecting the rights of the convicts of its state penal institution, and the avalanche of applications for various writs and correspondence which this appellant has directed to the courts, their officers, attachés and many others should most certainly be emphasis that the supreme court of Kansas has been liberal in entertaining such cases as this one.

The supreme court of Kansas, as it has been said before, took cognizance of the fact that the grievance of this appellant was based largely on his own bare allegations. Possibly it did not give much credit to the fact that he submitted three affidavits, two from life-term convicts in the state penitentiary and a third from an unknown woman. No records from any court of competent jurisdiction or any rules or regulations, or any other records which were in effect at the state penitentiary were offered on behalf of the appellant. Moreover, the state of Kansas offered the records of a court of competent jurisdiction in which this appellant was

represented by counsel; offered the affidavit of a county attorney covering various phases of the charges made against the district court of Sumner county, Kansas, all of which evidently the supreme court of Kansas gave greater credence, as a matter of fact.

The appellant cites the case of *Boykin v. Huff*, 121 F. 2d 865, as sustaining the viewpoint of the appellant. Again, in that case there was a positive showing that the petitioner had made an effort to appeal by the direction of letters to the court. No such showing has been made and proven here.

The practice in Kansas relating to appeals to the supreme court from a district court is provided in G. S. 1935, 62-1701, *et seq.* It provides that the appeal by the defendant is a matter of right and also that the appellate procedure shall be the same as in civil cases. It further provides that the appeal must be taken within two years after judgment is rendered. G. S. 1935, 62-1704.

The Kansas statute, G. S. 1935, 60-3306, provides that notice shall be filed with the clerk of the trial court; a copy must be served personally on the adverse party and then notice with proof of service and a copy of the judgment and order appealed from must be directed to

the clerk of the supreme court. This the appellant failed to do. The appellant was found guilty by the jury in the district court of Sumner county on May 15, 1933. On May 20, 1933, his motion for a new trial and motion in arrest of judgment were denied. On May 29, 1933, the judgment and sentence was pronounced by the district court of Sumner county. His counsel was present with him at all times, as disclosed by the journal entry. Two days later, May 31, 1933, the appellant was transported to the state penitentiary at Lansing. Obviously he filed no notice of appeal at that time, nor is there any indication that his attorney was denied the right to file notice of appeal, nor is there any evidence that he was denied the right to communicate with his attorney, relatives or friends, nor is there any proof offered that in the two years following the pronouncement of judgment and sentence, he was denied the right to see visitors, including members of his family, friends or his counsel. There is no allegation that he was prohibited from filing notice of appeal immediately after judgment and sentence, which is the customary practice in the state courts of Kansas. There is no allegation that immediately after pronouncement of judgment and sentence, and before he was transported to the peni-

tentiary, that he was denied visitation by his attorney, relatives or friends.

In the affidavit filed by Mrs. E. L. Hinton (R. 17), she declares that Cochran gave her the power of attorney to act in his behalf in the supreme court of Kansas; to file and execute all transactions in that court. It has been shown that if a notice of appeal was to be filed, it must be filed in the district court of Sumner county, Kansas; copy must be served on the adverse party and proof of service and a copy of the judgment and order must be then directed to the clerk of the supreme court of Kansas. Mrs. Hinton does not say in her affidavit that she possessed any notice of appeal or any documents relating to an appeal. She only says that the deputy warden "forbade me to take out any more papers belonging to C. H. Cochran." (R. 17.) What these papers might have been was never disclosed by the affidavit. Evidently the Kansas supreme court did not accept the view that it was a notice of appeal to be filed in the trial court under statutory provisions, as above cited.

The appellant relates in the so-called "statement of facts" (R. 10):

> "Your petitioner ask the defense counsel to give notice of appeal. Motion argued, if argued at all, in the absence of your petitioner. (Later another notice was sent to the trial court of which no receipt was received.)"

There is nothing in the record of the district court of Sumner county to sustain this allegation. There is no proof offered that the petitioner ever made the request of his counsel to file notice of appeal or that he ever directed a notice of appeal to the trial court. The complaint was his own, to which apparently the supreme court of Kansas did not give much credibility.

The appellant further alleged in his so-called statement of facts (R. 10):

> "The petitioner then wrote and moved the trial court to reopen the case of State of Kansas v. Cochran on the discovery of new evidence to which the court never acknowledge the receipt of the motion. Copies of the original affidavit was confiscated. The State set about to block and forcibly restrain your petitioner from filing his appeal. Your petitioner ask that he be permitted to secure his transcript. This was denied by the State authorized officials and agents and by the prison rules. The time your petitioner's appeal limit had expired and under similar restraint your petitioner was denied the right to file a petition for writ of habeas corpus. Eventually the petition was filed in an unusual way, this petition was

> No. 32802, setting up several questions on the trial of your petitioner. This petition was denied by the state supreme court without so much as any kind of a hearing, and was arbitrarily denied and a decision was written without any lawful defense in the said case."

This allegation by the appellant is unsustained by competent evidence and the petition No. 32802 to which he refers is reported in the Kansas Reports in the case of *Cochran v. Simpson*, supra. Later, as the appellant alleges, the supreme court of Kansas asked the attorney general to make informal investigation of the complaint (R. 10), which was done and a copy was filed with the supreme court. Reference is made to that investigation in the appellee's brief in the supreme court of Kansas. (R. 55.)

The appellant, while it is a trivial matter, complains that the latest appeal which the appellant filed from the district court of Leavenworth county in the Kansas supreme court, which appeal was filed with the clerk of the district court of Leavenworth county and not the Kansas district court, December 31, 1940, but for some unexplained reason was not formally filed in the supreme court of Kansas until June 2, 1941. However, the appellant is somewhat inconsistent because he acknowl-

edges the fact in his brief that the appeal was consolidated on March 15, 1941, by the supreme court of Kansas with the original application which the petitioner had filed on January 8, 1941. The appellant just failed to set out that following his notice of appeal filed December 31, 1941, and the original application filed January 8, 1941, he failed to comply with the rules of the Kansas supreme court by advancing court deposit for both cases. He also failed to set out in his record that through the generosity of the clerk of the Kansas supreme court, a letter was directed to this appellant suggesting that he should comply with certain rules of the supreme court, giving the numbers, which included dockting both the appeal and original application on poverty affidavit, thereby relieving him of the costs. This he did and in due time both the appeal and the original application were consolidated and docketed.

The appeal from the judgment of the district court of Leavenworth county was dismissed because the supreme court of Kansas took cognizance of the fact that "Nothing further is filed respecting that appeal. The petition ruled upon by the district court is not before us. The appeal is therefore dismissed." (R. 63.)

In the brief of the appellant, it is said:

> "Instead of ordering a return by respondent or issuing order to show cause why the writ should not issue, the supreme court ordered both petitioner and respondent to file abstracts and briefs."

Obviously that is an error and a misstatement, because the supreme court of Kansas did require the respondent to file a return, which is shown in the record. (R. 37-54.) In addition thereto, the respondent filed a brief in support of the return. (R. 54.) However, the appellant in his brief, under the heading of "Respondent's Return," makes reference to the same.

The supreme court of Kansas had the obligation to weigh the evidence and to judge its credibility. It also determined questions of law. There is no showing that the appellant offered, other than the three affidavits previously referred to, any evidence except his own statements. He offered no competent evidence that would substantiate his own viewpoint, such as the records of the district court of Sumner county, Kansas, records and rules of the Kansas State Penitentiary, reports of his grievance or complaints to the State Board of Administration, which is the Parole Board for Kansas, nor is there any proof that this appellant addressed

his grievances to any authorities which would be competent evidence to show that he had been denied this constitutional right of appeal from his conviction. Seven years elapsed from the time of his commitment to the state penitentiary until he cooked up the idea of denial of the right of appeal. The appellant simply failed or neglected to appeal. The various grounds upon which he has sought his release from the state penitentiary through court action and by executive clemency have been numerous and varied. There has been a total lack of consistency on the part of the appellant in the various and many applications upon which he has sought his release from the state penitentiary. It must be stated that no evidence is offered that any other inmate of the Kansas state penitentiary was denied the right of appeal. The appellant sets up that the warden and others tried to set up a "perpetual blockade" against him. True enough, they have opposed his release from the state penitentiary, but not through methods of which he now complains.

This appellant has written volumes to members of the courts in Kansas and their attachés, to case workers, to the Board of Administration and its parole attorney, to the attorney general of the state and many others. This

appellant does not contend or maintain that in the two years which were within the statutory time for his appeal following his incarceration in the state penitentiary in May, 1933, that he was deprived of communicating with friends on the outside of the penitentiary or of having visitors at the regular prison visiting hours. He does not set up that he was denied the privilege of communicating with his own attorney, but he does suggest fanciful stories which he has not proven. His own statements, of which the Kansas state supreme court took cognizance evidently in its discretion in not granting the release of the prisoner from the custody of the appellee, were not proven. Perhaps the supreme court of Kansas, in determining questions of fact, gave greater credence to the records of a court of competent jurisdiction and to the affidavit of the county attorney as against the wild allegations of the appellant and the two affidavits of fellow convicts and an unknown woman, one of which was made alleging that the appellant had complained to him on or about the 15th day of May, 1933, that the appellant asked him to offer corrections to his appeal papers when in reality the appellant had not at that time actually been sentenced to the state penitentiary. The affidavit of the woman in itself is not clear,

but is an affidavit of generalities and does not make any reference to any efforts to appeal on behalf of the appellant.

These, appellant is insisting, should be the reasons why he should be released from the Kansas State Penitentiary, against the competent evidence offered on behalf of the appellees.

CONCLUSION

The appellees respectfully contend that the burden of proof on an application for a writ of habeas corpus is upon the petitioner to prove his allegations by competent evidence. This in the instant case has not been done by the appellant.

The appellees further contend that commitments to a state penitentiary from a court of competent jurisdiction should not be set aside merely upon the allegations of a defeated litigant. The failure or neglect to appeal from the conviction of a felony is not a ground for release through habeas corpus. It is essential that a petitioner prove any allegations respecting the violation of his constitutional rights by competent evidence, and not by allegations in generalities. The appellees herein have set out the record as the authority for the detention of

the appellant in the state penitentiary of Kansas. The record was presented to the supreme court of Kansas and in its discretion it did not find as a matter of fact that the allegations of the appellant were sustained, but, moreover, that there was ample authority for the detention by the appellees of the appellant, who had been convicted and sentenced to the state penitentiary as an habitual criminal.

It is respectfully urged that the supreme court of Kansas in the instant case was correct in its rulings as to matters of fact and matters of law and that the allegations in the original application filed herein are unsubstantiated and without foundation.

Therefore it is respectfully urged that the judgment of the supreme court of Kansas should be upheld and the application for writ of habeas corpus be denied.

Respectfully submitted,

JAY S. PARKER,
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JAY KYLE,
Assistant Attorney General of Kansas,
Attorneys for Appellees.

SUPREME COURT OF THE UNITED STATES.

No. 510.—October Term, 1941.

C. H. Cochran, Petitioner,
vs.
The State of Kansas and Milton F. Amrine, Warden, Kansas State Penitentiary.

On Writ of Certiorari to the Supreme Court of the State of Kansas.

[May 11, 1942.]

Mr. Justice Black delivered the opinion of the Court.

In 1933, the petitioner Cochran was convicted by a jury in a Kansas state court upon a charge of passing a $12.60 check with knowledge that it was forged. His motion for a new trial was overruled. Upon a finding that Cochran had previously been convicted of two other felonies the court sentenced him to life imprisonment as an habitual criminal pursuant to a Kansas statute. Kan. Gen. Stat. (Corrick, 1935) Sec. 21-107a. Two days later he was sent to the state penitentiary where he has since been confined.

In January, 1941, Cochran acting in his own behalf filed an original application for habeas corpus in the Supreme Court of Kansas. His application sets out the allegations, among others, that the trial judge had denied him the right to summon witnesses and to testify on his own behalf; and that officials of the state penitentiary enforcing prison rules there in effect had suppressed appeal documents he had prepared, thereby making it impossible for him to perfect an appeal during the two year period allowed by Kansas statute. The State filed a return containing a certified copy of the information on which Cochran was tried, journal entries of the trial, an order overruling Cochran's motion for a new trial, and the judgment and sentence.

The Kansas Supreme Court denied the writ, stating that "the records of courts are not set aside upon the unsupported statements of a defeated litigant." 153 Kan. 777. We accept the court's conclusion that the record, showing that Cochran was represented by counsel throughout, and revealing on its face no irreg-

ularities in the trial, is sufficient refutation of his unsupported charge that he was denied the right to summon witnesses and testify for himself.

But the allegations that prison officials frustrated Cochran's efforts to perfect an appeal are a different matter. Since these allegations relate to a period subsequent to Cochran's commitment, and since that is the latest event referred to in the record, the record itself affords no refutation. Nor are these allegations denied in any other part of the State's answer. Moreover, the opinion of the court itself recognizes that these allegations had "some basis", pointing out that "under rules . . . prevailing at the penitentiary" for some time following Cochran's commitment he was prevented from sending out a petition for habeas corpus, and that it was not until October, 1935, (after the time for appeal had expired) that such a petition was actually filed. On the other hand, nothing in the opinion indicates that the court denied the application on the ground that it had canvassed the allegations and supporting affidavits of Cochran and three others pertaining to suppression of appeal and had concluded that they were untrue.

Cochran's application for habeas corpus does not bear the name of counsel. Not a lawyer, he apparently prepared it himself. On the issue of denial of opportunity to perfect an appeal, he alleged that the "record shows that the duly authorized officers and prison officials exercised unlawful authority by surpressing your petitioners appeal documents", *etc.* In its brief and argument before us, the State has contended that the word "record" can refer only to the trial record set out in its return to Cochran's application. Since that record does not show the alleged suppression, it is urged that Cochran's application was properly denied because wholly unsupported. As we have pointed out, the record of the trial court proceedings, relating as it did to a period ending with Cochran's commitment, could prove nothing with respect to independent subsequent events. Hence, to place the construction urged by the State on the word "record" as used by Cochran would not merely impute to him a technical precision which his application as a whole contradicts; it would render the application entirely meaningless.

The State properly concedes that if the alleged facts pertaining to suppression of Cochran's appeal "were disclosed as being true

before the supreme court of Kansas, there would be no question but that there was a violation of the equal protection clause of the Fourteenth amendment." And in Kansas, habeas corpus is recognized as affording a remedy for a person held in prison in violation of a right guaranteed by the Federal Constitution.[1] However inept Cochran's choice of words, he has set out allegations supported by affidavits and nowhere denied that Kansas refused him privileges of appeal which it afforded to others. Since no determination of the verity of these allegations appears to have been made, the cause must be remanded for further proceedings.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[1] See *e. g.* In re Jarvis, 66 Kan. 329. Cf. Smith v. O'Grady, 312 U. S. 329.